



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 50

P128/26

OPINION OF LADY POOLE

in the Petition of

THE SCOTTISH INFORMATION COMMISSIONER

Petitioner

against

THE SCOTTISH MINISTERS

Respondent

Petitioner: Dean of Faculty; Anderson Strathern
Respondent: Reid KC, Welsh; Scottish Government Legal Directorate

3 June 2026

Background and summary

[1] In this petition, the Scottish Information Commissioner (the “**Commissioner**”) asks the court to inquire into whether the Scottish Ministers have failed to comply with a decision notice issued by the Commissioner, and deal with them as if they had committed a contempt of court. The Scottish Ministers invite the court to refuse to make the orders sought by the Commissioner, and to dismiss the petition. It is the first petition brought by the Commissioner under section 53 of the Freedom of Information (Scotland) Act 2002 (“**FOISA**”).

[2] The background is that in 2019, the (then) First Minister Nicola Sturgeon referred herself for an independent investigation into whether she breached the Scottish Ministerial Code in respect of meetings and discussions with her predecessor Alex Salmond. On 22 March 2021, a report was published by James Hamilton (the “**Report**”), finding that there were no breaches of the Scottish Ministerial Code in the ways alleged.

[3] On 27 October 2024, Benjamin Harrop made a request to the Scottish Ministers for communications and information relating to the Report and associated legal advice. The Scottish Ministers disclosed some information, but did not disclose other information, relying on various exemptions in FOISA. Mr Harrop made an application to the Commissioner under section 47 FOISA, seeking to recover more of the information falling within his request. On 1 December 2025, the Commissioner issued Decision Notice 281/2025 under section 49(5) FOISA (the “**Notice**”), requiring the Scottish Ministers to disclose certain information (the “**withheld information**”) and provide a revised review outcome by 15 January 2026.

[4] This case is concerned with the actions of the Scottish Ministers in relation to the Notice. Parties have provided helpful written and oral material, all of which has been taken into account by the court. In summary, the court finds it should inquire into the matter. Having made that inquiry, the court finds that the Scottish Ministers failed to comply with the Notice timeously, and that it is appropriate to exercise its powers to deal with the Scottish Ministers as if they had committed a contempt of court. The Scottish Ministers are admonished for failing to comply with the steps set out in the Notice within the time period in the Notice. They are also ordered to pay the Commissioner’s expenses in the petition on an agent-client, client paying basis.

Relevant provisions of FOISA

[5] The Commissioner exercises a statutory role under section 42 FOISA. The Scottish Ministers are a Scottish public authority subject to FOISA (sections 1(1) and 3, and Schedule 1, part 1 paragraph 1). The Commissioner has various general duties with a view to promoting observance by Scottish public authorities of the provisions of FOISA and Codes of Practice issued under FOISA (section 43).

[6] The Commissioner has enforcement powers under Part 4 FOISA. Individuals may apply to the Commissioner for decisions about whether information requests they have made to public authorities have been dealt with in accordance with Part 1 FOISA (section 47). The Commissioner must make a decision in relation to such applications under section 49 FOISA, and that is how the Notice in this case came to be issued.

[7] If the Commissioner decides information requests have not been dealt with in accordance with Part 1 FOISA, under section 49(6) FOISA a decision notice must specify:

- “(a) the provision of that Part with which the authority has failed to comply and the respect in which it has so failed;
- (b) the steps which, in the opinion of the Commissioner, the authority must take to comply with the provision; and
- (c) the time within which those steps must be taken.”

[8] It is therefore an express statutory requirement of section 49(6)(c) FOISA that a decision notice contain a time limit for compliance, by which time specified steps to comply with FOISA must be taken by the relevant public authority. Section 49(7) specifies that the time limit must not expire before the end of the period for bringing an appeal against the Notice under section 56. Section 56 allows for appeals on points of law to the Court of Session, and the time limit for bringing those sorts of appeals is 42 days. If, therefore, a public authority considers that there is an error of law in a decision notice, it may appeal it.

If it appeals, no step affected by the appeal needs to be taken before the case is finally determined (section 49(7) FOISA).

[9] Should a public authority fail to comply with steps set out in a decision notice issued by the Commissioner under section 49, then section 53 FOISA provides, insofar as relevant:

“53 Failure to comply with notice

- (1) If a Scottish public authority has failed to comply with—
 (a) so much of a notice given to it by the Commissioner under subsection (5) of section 49 as, by virtue of subsection (6)(b) of that section, requires steps to be taken by the authority...

the Commissioner may certify in writing to the court that the authority has failed to comply with the notice.

...

- (3) Where a failure to comply is certified under subsection (1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the authority, and after hearing any statement that may be offered in defence, may deal with the authority as if it had committed a contempt of court.

- (4) In this section, ‘the court’ means the Court of Session.”

[10] A court to which a case has been certified under section 53(1) FOISA has various tasks. First, the court has to decide whether to inquire into the matter, because the word “may” in section 53(3) implies a discretion whether to do so or not. If the court decides to make inquiry, the next stage is for it to consider evidence and make relevant findings. If, as a result of the inquiry, the court is satisfied that there has been a failure to comply with parts of the decision notice that required steps to be taken by a Scottish public authority to comply with FOISA, it must then decide whether to deal with that authority as if they had committed a contempt of court. If the court decides to do so, it must consider whether to apply a sanction, and if so, which sanction.

Should the court inquire into the matter?

[11] In this case, the Commissioner has certified in writing to the court under section 53(1) FOISA that the Scottish Ministers have failed to comply with the Notice. The Scottish Ministers argue that it was irrational for the Commissioner to certify the case to the Court of Session, and ask the court to dismiss the petition. The Commissioner submits that the Notice and the Certificate remain in force, they have not been reduced, it was not irrational to issue the Certificate, and asks the court to inquire further into the matter. The court's first task under section 53(3) FOISA is to decide whether it should inquire into the matter.

Legal principles governing whether the court should inquire into the matter

[12] FOISA was enacted in exercise of devolved legislative powers, and applies to Scottish public authorities. Although this case is the first referral to the court under section 53 FOISA, the Freedom of Information Act 2000 ("FOIA") also applies in Scotland. Both FOIA and FOISA contain provisions specifying which public authorities they apply to. In broad summary, FOIA applies to public authorities which exercise functions within powers reserved to the UK, and UK wide bodies, and FOISA to Scottish public authorities exercising devolved functions. In this way, there are rights to request information from all public authorities operating in Scotland. Although there are some important differences between FOIA and FOISA, including that the two Acts appoint different commissioners, and that there is no provision in FOISA for appeals against decisions of the Commissioner to a tribunal, FOISA in many other ways follows the overall scheme of FOIA.

[13] For this reason, decided cases under FOIA may assist with the approach to section 53 FOISA. In particular, *Moss v Kingston-upon-Thames RLBC* [2023] EWCA Civ 1438, [2024] 1

WLR 2869 (“*Moss*”) paragraphs 36 to 47, which concerns certification under section 61 FOIA rather than section 54 FOIA (section 54 being the equivalent of section 53 FOISA), gives some guidance. In essence there is a two stage process when a tribunal has to decide whether to certify a case onwards under section 61(3) to (6) FOIA for consideration of exercise of powers in relation to contempt of court. The tribunal should first decide if the act or omission in question is capable of constituting a contempt if it had occurred before a court with power to commit for contempt, and then decide if its discretion to certify should be exercised because, for example, the act or omission is sufficiently serious to warrant inquiry and possibly sanction (paragraph 43). Other authority suggests that committal applications for consideration of contempt of court may be seen as an appropriate and legitimate means not only of seeking enforcement of a decision, but also (or alternatively) of drawing to the court’s attention a serious (rather than purely technical) contempt. Applications to the court for exercise of its powers in relation to contempt of court should be proportionate by reference to the gravity of the conduct alleged and brought for legitimate ends (*Navigator Equities Ltd and another v Deripaska* [2021] EWCA Civ 1799, [2022] 1 WLR 3656 (“*Navigator Equities*”) paragraph 82).

[14] The task for the Commissioner, when deciding whether or not to exercise powers to certify under section 53(1) FOISA, may also be seen as a two stage process. First, does it appear to the Commissioner that a Scottish public authority has failed to comply with so much of the Notice as required steps to be taken by them? Second, should the case be certified to the court? The Commissioner is not obliged to certify, even if they consider there has been a failure in compliance. However, the court rejects a submission on behalf of the Scottish Ministers that there must be something “unusual or exceptional” before the Commissioner may certify a case to the court, because that is not the statutory wording.

Rather, having regard to *Moss* and *Navigator Equities*, the focus is on whether there is a need for enforcement at the time the certification is made and the petition is brought, or the circumstances are such that it is appropriate to draw the court's attention to them for the purpose of the court deciding whether to make inquiry and exercise powers to impose a sanction.

[15] The court's task is different from that of the Commissioner and has already been set out in paragraph [10] above. When deciding whether or not to inquire, the court is essentially asking itself whether the circumstances reported to it by the Commissioner, in the light of any answers lodged, merit inquiry. If the reported failure seems trivial, or not the type of conduct which it is appropriate to draw the court's attention to, or the certification appears to be brought for an improper collateral purpose, the court might decide not to make inquiry (*Navigator Equities* paragraph 82).

[16] However, the circumstances in which a court would decline to inquire into a certification made by the Commissioner under section 53 FOISA are likely to be rare. The Commissioner exercises a statutory role, and has specialist knowledge of the operation of FOISA. The power to certify under section 53 FOISA cannot be said to have been overused by the Commissioner, given that this is the first time it has been invoked in over 20 years. It is important to recognise that section 53(3) provides for an inquiry before the court makes any decision about whether to deal with a public authority as if it had committed a contempt of court. As part of that inquiry, the public authority is entitled to raise any matters relevant to the exercise being undertaken by the court under section 53(3), including by leading witness evidence and making statements. That essentially allows a merits review of whether there has been a failure under section 53(1)(a), if that is not admitted. It also allows any aggravating or mitigatory factors relevant to disposal to be brought to the

attention of the court. The court's powers to refuse to grant any sanction, and make adverse awards of expenses including on an agent-client, client paying basis, are likely to be sufficient in themselves to discourage unmeritorious certifications to it.

[17] Before moving on, it is necessary to address an argument of the Scottish Ministers about irrationality. The Scottish Ministers submit that the court should apply what is essentially a judicial review approach to the decision of the Commissioner to certify under section 53(1) FOISA, find it irrational and refuse the petition on that basis. The Commissioner on the other hand argues that the complaint of irrationality is irrelevant.

[18] The court finds the approach of the Scottish Ministers fails adequately to take into account the whole terms of section 53. Judicial review principles are not typically used where a review on the merits is available. A section 53(3) inquiry is potentially wide ranging. As part of that inquiry, the public authority in question may raise any matters relevant to the exercise being undertaken by the court. There is no bar to the public authority challenging the merits of whether there has been a failure under section 53(1) FOISA. The inquiry also provides an opportunity to the public authority to raise mitigatory factors and submit no sanction should be applied. Reservations that a Scottish public authority has about certification may be addressed as part of that process. There is no need for a gateway judicial review of the decision to certify, before the court carries out the inquiry set out in the statutory provisions. Even if that were to be wrong, the court would not have found the decision to certify to be irrational, given the accepted failure by the Scottish Ministers to produce the withheld information within the deadline specified in the Notice, and the content of the letters of the Scottish Ministers dated 15 and 22 January 2026 discussed further below. The Notice was unchallenged and lawful, the Scottish Ministers had not complied with a required step in it timeously, and on the face of their letters were

deciding for themselves when they would comply. In those circumstances it was not irrational for the Commissioner to certify the failure to comply for consideration by the court.

The court's decision on whether it should inquire into the matter

[19] The circumstances of this case merit further inquiry by the court. The Scottish Ministers accept that they did not comply with the time limits set by the Commissioner in the Notice. They did not take the steps to comply with FOISA timeously. The Notice specified a deadline of 15 January 2026, but the withheld information was not disclosed until 24 February 2026. There is no dispute about the terms of the correspondence between the Scottish Ministers and the Commissioner, from which it is evident that the Scottish Ministers had not requested any specific time period of extension. There was no compliance, and no date for compliance, by the time the Commissioner brought this petition on 2 February 2026. Those circumstances are sufficient to persuade the court that it ought to inquire further.

The court's inquiry

[20] It is a requirement of section 53(3) FOISA that the court give parties the opportunity to lead evidence and make statements when carrying out its inquiry. In this case, parties each lodged written evidence, produced affidavits, elected not to lead any oral evidence, and made submissions to the court. The Commissioner produced an affidavit sworn by him on 22 April 2026. The Scottish Ministers produced an affidavit sworn by Michael John Chalmers on 24 February 2026. Mr Chalmers is a civil servant who is Director for Propriety and Ethics within the Scottish Government.

Findings in fact

[21] On the basis of the material before it, the court makes the following findings of fact.

[22] The Notice issued by the Commissioner under section 49 FOISA, dated 1 December 2025, contained the following passage:

“...the Commissioner finds that the Authority failed to comply with Part 1 of FOISA by:

- wrongly relying on the exemption in section 30(c) of FOISA to withhold information from the Applicant in response to part 1 of his request (and thereby failing to comply with section 1(1))
- failing to satisfy him that it was entitled to rely on section 12(1) of FOISA to refuse to comply with part 3 of the Applicant’s request.

The Commissioner requires the Authority to disclose to the Applicant the information it wrongly withheld under section 30(c) of FOISA and to issue him with a revised review outcome (in terms of section 21) in relation to part 3 of his request (which must be other than in terms of section 12(1)), by 15 January 2026.”

[23] In terms of the Notice, the Scottish Ministers were ordered to disclose the withheld information and issue a revised review outcome to the applicant, Mr Benjamin Harrop, by 15 January 2026. That date was calculated by the Commissioner on the basis it was 6 weeks plus 3 days after the date the Decision was intimated. The time for compliance expired after the 42 day period within which an appeal could be brought against the Notice. The Notice also informed the Scottish Ministers of the Commissioner’s right, if they failed to comply, to certify that failure to the Court of Session.

[24] In submissions made by the Scottish Ministers to the Commissioner before the Notice was issued, the Scottish Government had claimed an exemption based on excessive cost of compliance. There are regulations relevant to how such costs are to be calculated (the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004). At the time of making submissions, the Scottish government estimated it would take 44 hours and 21 minutes to conduct the necessary work to comply with the request. The Notice

considered the application of the exemption based on cost of compliance (between paragraphs 95 and 113), and gave reasons for the Commissioner's decision that exemption did not apply.

[25] The Scottish Ministers did not appeal the Notice, although the Commissioner had informed them in the Notice of the right to appeal to the Court of Session on a point of law within 42 days of the intimation of the Notice. The Scottish Ministers were not therefore entitled to the benefit of section 49(7) FOISA, which entitles a party who has brought an appeal not to take any step affected by the appeal until the cause is finally determined.

[26] The Scottish Ministers did not disclose the withheld information by 15 January 2026. The Scottish Ministers did not contact the Commissioner prior to 15 January 2026 to request an extension.

[27] On 15 January 2026, Lorna Gibbs, Deputy Director, wrote to the Commissioner on behalf of the Scottish Government in the following terms:

"I refer to your decision notice 281/2025, received on 1 December 2025.

The Scottish Government will comply with the decision and is working through the material covered. In doing so, we are giving careful consideration to the need to comply with court orders which are in place which may require some of the material to be withheld. This assessment is complex, given the need to avoid inadvertent jigsaw identification. The volume of material to be assessed is also extensive. Unfortunately this means that we will be unable to issue a revised review outcome by your deadline of 15 January.

We have brought in additional resource to undertake this task and will complete it as soon as possible, before releasing all of the information which is not exempt, in line with your decision. In the meantime we would be grateful if you would note our position."

That letter did not request any particular period for an extension of time to comply. Instead, it stated the task would be completed "as soon as possible".

[28] The Commissioner responded on 16 January 2026 as follows:

“I refer to my decision sent to you on 1 December 2025. The Decision Notice sets out the steps which I require the Scottish Ministers to take in order to comply with the Freedom of Information (Scotland) Act 2002, together with the date for compliance.

I also acknowledge receipt of your email to me dated 15 January 2026 in which you advised me that you would not be in a position to comply with Decision 281/2025 by the deadline of 15 January 2026.

If the Scottish Government does not comply with the Decision Notice, I have the right to refer the matter to the Court of Session. The Court of Session may investigate the matter and treat the failure to comply as contempt of court.

I have now instructed the commencement of non-compliance procedures. In considering this action I have considered the late intimation to me that Ministers would fail to meet the deadline set. I am of the view that Scottish Ministers’ practice of last-minute communication on cases relating to the Hamilton Inquiry reflects poorly on the Scottish Government and disrespects the applicant and wider Scottish public on a matter of significant public interest.

I am disappointed that notice was only given of the need for substantial additional (non-chargeable) work, five minutes before the statutory deadline (six weeks after my original decision notice) and would welcome an explanation. I further note that Ministers have failed to offer a new compliance date.

Please provide me with evidence that the Scottish Ministers have complied with the Decision Notice by 22 January 2026.”

[29] The Scottish Ministers did not disclose the withheld information or provide an updated review decision by 22 January 2026.

[30] Instead, on 22 January 2026 Andrew Bruce, Director of Communications and Ministerial Support, wrote a letter to the Commissioner in the following terms:

“I refer to your letter sent to Lorna Gibbs on 16 January 2026, and the notification that you have commenced non-compliance procedures.

The First Minister has made clear that The Scottish Government will comply with decision notice 281/2025 and will do so as soon as practicably possible. Accelerated work is underway to consider each document for release. As previously intimated, the assessment is complex, given the need to avoid inadvertent jigsaw identification. You are aware of the court orders which make it clear that the identities of those who complained in relation to allegations of sexual assault must have their identities protected. As a result, each document must be carefully considered and redacted if required. We cannot release information which would breach those court orders and amount to a contempt of court.

Those involved are working quickly and carefully to ensure compliance with the various legal obligations that apply to this information. We do not anticipate that this will take much longer.”

Once again, this letter did not request any particular date for an extension of the time for compliance, but stated compliance would be “as soon as practicably possible” and it was not anticipated that “this will take much longer”.

[31] By 2 February 2026, the Scottish Ministers had still not disclosed the withheld information, nor requested any particular time period for an extension.

[32] The petition to this court by the Commissioner was accepted and registered on 2 February 2026. It was served on the Scottish Ministers on 3 February 2026.

[33] The withheld information was not issued to Mr Harrop or published until 24 February 2026. Thereafter the Scottish Ministers had to correct some minor redaction errors in the disclosed material.

[34] The Scottish Government has handled over 80 information requests and reviews relating to the investigation by James Hamilton. The Commissioner has been involved in relation to a number of these requests and reviews. As a result, the Commissioner has relevant experience in information requests concerning the Report and related issues. The Scottish Government was dealing with more than one notice issued by the Commissioner relating to the Hamilton inquiry during the time period for compliance with this Notice.

[35] The Court of Session has made an order under section 11 of the Contempt of Court Act 1980, as has the High Court of Justiciary, protecting the identity of complainers in the criminal proceedings against, and civil litigation commenced by, Alex Salmond. The Scottish Ministers have given an undertaking to the court in that regard. The Scottish Ministers

require to comply with those orders and the undertaking. Both the Scottish Ministers and the Commissioner are aware of those orders and the undertaking.

[36] The documentation within the scope of the Notice was catalogued around about the time the initial information request was received from Mr Harrop on 27 October 2024. At the time of making submissions to the Commissioner prior to the Notice, the Scottish Ministers said their searches had identified 589 documents that were in scope (paragraph 104 of the Notice). By contrast, in the affidavit before the court on behalf of the Scottish Ministers it was stated that there were over 800 documents amounting to about 3,000 pages within scope.

[37] The Scottish Ministers did not commence physical work on documents within scope immediately upon receipt of the Notice, in order to identify which parts should be released, any necessary redactions, and whether there were constraints due to the court orders and undertaking. Instead, a submission containing advice recommending appealing the Notice was put to the Scottish Ministers on 15 December 2025. That advice was rejected after consideration. After views of counsel were received on 23 December 2025, steps were taken to identify staffing resource to redeploy to assist with compliance with steps required by the Notice. Due to the Christmas break, that resource was not available until after staff returned from leave. The physical process of reviewing the catalogued documents did not start in earnest until January 2026.

[38] It became increasingly obvious within the team working on compliance with the Notice on behalf of the Scottish Ministers that the deadline of 15 January 2026 would not be achieved. However, the Scottish Ministers did not contact the Commissioner until the deadline of 15 January 2026 had been reached. After the Commissioner's letter dated 16 January 2026, additional staff were identified to help complete the task. By the time the

withheld information was produced, 3 civil servants from Propriety and Ethics, with six other officials from another Directorate, supported by five solicitors, had become involved in complying with the Notice. Specialist software was used to assist.

[39] The Commissioner uses an Investigations Handbook, which sets out procedure for investigations under FOISA. The handbook is internal guidance, not law. In a section which relates to procedure at the time a decision notice is issued, there is discussion about the compliance date to be included in a decision notice (paragraph 224(iii)). It notes that in practice at least 45 calendar days is given from the date the decision is issued, and that it helps to calculate this as 6 weeks and 3 days. It also states:

“Additional leeway may also be given over Christmas and Easter holidays or where the amount of information requiring to be compiled and disclosed means it may be difficult for the authority to comply within 45 days. (Authorities must not be given more than 50 days to comply with the agreement of the HOE [Head of Enforcement].)”

The Investigations Handbook also contains a section on Enforcement. Paragraph 254 provides:

“If the public authority has not complied with the steps required in the decision notice, under section 53(1) the Commissioner has the right to refer the case to the Court of Session as soon as the time for compliance has passed. However, the following steps will normally be followed before a referral is made, unless the public authority has advised us that it does not intend to comply with the decision notice or if, in the HOE’s view, it is reasonable in the circumstances to refer the matter to the Court of Session straightaway.”

The handbook goes on to specify a procedure, if the matter has not been referred to the Court of Session straight away, involving various stages such as the Head of Enforcement writing to the Chief Executive of the public authority giving 5 days to comply, and proceedings instructed if there is no compliance after 10 working days.

[40] The Scottish Ministers did not before the court tender any apology to the Information Commissioner for failing to comply with the time limit in the Notice, and in respect of the terms of its letters of 15 and 22 January 2026.

Conclusions from factual findings

[41] The Notice required the Scottish Ministers to disclose the withheld information and issue a revised review outcome by 15 January 2026, as a “step” within the meaning of section 53(1) FOISA. The Scottish Ministers did not carry out that step until 24 February 2026, by which time the case had already been certified to the court. At the time of certification, there was a failure on the part of the Scottish Ministers, a public authority covered by FOISA, to comply with the part of the Notice that required steps to be carried out by it.

[42] At the time of the court’s inquiry, the Scottish Ministers have now disclosed the withheld information. There is no longer a failure to comply with a step in the Notice. However, the failure to do so within the time limit set out in the Notice, and the way that the Scottish Ministers approached that time limit, are matters of concern to the court.

[43] FOISA contains a requirement that a date for compliance be contained in a decision notice under section 49(6)(c) FOISA. It is not difficult to see why that might be important. Decision notices which have not been appealed should be complied with, even if compliance is burdensome and inconvenient (cp *Perkier Foods Ltd v Halo Foods Ltd* [2019] EWHC 3462 (“*Perkier Foods*”) paragraph [15]). The system of recovery of information from public authorities depends on the setting of dates, so that the availability of enforceability measures is regulated. Section 49(6)(c) provides that the Commissioner is to set the compliance date, not the public authority in question. Allowing a Scottish public authority to choose when to

comply would be likely to cause uncertainty in the enforcement regime, diluting FOISA's intended effect.

[44] Scottish public authorities are expected to comply with time limits set by the Commissioner. They are relatively generous, and longer than the period allowed for appealing a decision notice under section 56 FOISA. There are avenues available to public authorities if they are concerned about a time limit in a decision notice under section 49 FOISA. If the time limit set is not in accordance with the statutory requirements, or fails properly to have regard to the Commissioner's own internal guidance about setting the date in the Investigations Handbook, an appeal on a point of law might in principle be available. That would stop the clock under section 49(7) until the appeal is finally determined. Alternatively, and probably more commonly, a Scottish public authority can write to the Commissioner requesting an extension until a particular time, before which enforcement action will not be commenced, and giving reasons for that request. The Commissioner is expected to act reasonably in relation to such requests.

[45] The Scottish Ministers neither appealed the Notice nor requested an extension to a particular date. The court accepts that the need to ensure compliance with court orders aimed at preventing the identity of complainers in criminal and civil proceedings meant there was an added layer of complexity in complying with this particular Notice, and the period for compliance from 1 December 2025 to 15 January 2026 included the Christmas break. But that did not entitle the Scottish Ministers to disapply for themselves time limits placed on them in accordance with an Act of the Scottish Parliament. The letters of 15 and 22 January 2026 sent on behalf of the Scottish Ministers to the Commissioner, and the failures of the Scottish Ministers to comply with a required step in the Notice until 24 February 2026, showed a lack of proper respect for the Commissioner's statutory role and

the freedom of information intended by FOISA. Failure to comply was stated as a fact without any apology. In both of the letters of 15 and 22 January 2026, the Scottish Ministers sought to annex to themselves decisions about when compliance with the Notice would take place. Even that was left vague – “as soon as possible” or “as soon as practicably possible”. The Scottish Ministers have given differing accounts of how many documents had to be checked to the Commissioner and in an affidavit to this court, but it is accepted that it turned out to be a substantial task. Redacting documents within scope does not appear to have commenced until after staff came back from the Christmas break, which was some time after the date of issue of the Notice on 1 December 2025. There was a deliberate choice to use much of the time period in the Notice for purposes other than preparing documents for disclosure. In all of those circumstances, deliberate choices by the Scottish Ministers led to the failure to comply with steps in the Notice timeously.

Should the court deal with the Scottish Ministers as if they had committed a contempt of court?

[46] The Commissioner invites the court to find the Scottish Ministers in contempt and proceed to apply a sanction. The Commissioner is neutral on what that sanction should be. For the assistance of the court, short submissions were made about cases where fines had been imposed or indemnity expenses awarded. The Scottish Ministers, on the other hand, invite the court to find there was no contempt. Or, if there was, the appropriate sanction should be admonishment, with further submissions invited on expenses because it is the first case under section 53 FOISA and is expected to provide guidance about its application.

[47] The court has a discretion under section 53(3) FOISA whether to “deal with the authority as if it had committed a contempt of court”. The words “as if” are included

because a certification reference is not dealing directly with a contempt of court. The Scottish Ministers have failed to comply timeously with a decision of the Commissioner, rather than a decision of the court. If there is contempt, it is contempt of the Commissioner, not the court. Nevertheless, because of the reference to contempt of court in section 53(3), it is relevant to consider some of the established law governing contempt, because that may be seen as a gateway to the imposition of sanctions. Below, the law governing the standard that must be met for there to be a finding of contempt, the range of powers available to the court to punish contempt, and the factors which bear on the choice of disposal, is set out, then applied.

The standard which must be met for a finding of contempt of court

[48] The Commissioner submits that the behaviour of the Scottish Ministers meets the standard for a finding of contempt. The Commissioner relies principally on dicta in *Murray v HM Advocate* 2022 JC 181 ("*Murray*") at paragraphs [60] to [61], to the effect that if there is a court order, and a person deliberately does something which breaches it, that is sufficient for a finding of contempt. The deliberate conduct constitutes the wilful defiance of the court. It is no defence that a person did not intend to commit contempt when they deliberately did an act which breached the order.

[49] The Scottish Ministers on the other hand submit that, applying dicta in *Beggs v Scottish Ministers* 2005 1 SC 342 ("*Beggs*") at paragraph [30], their behaviour and failures did not amount to a contempt. Their failures had not been wilful or shown lack of respect or disregard. The delay in compliance was not intended to be offensive to the dignity of the Commissioner, but rather showed respect for the dignity and authority of the courts because delays were due to try to comply with court orders preventing jigsaw identification of

complainers in the trial of Alex Salmond for sexual offences. There was no contempt proved to a standard of proof beyond reasonable doubt (*CM v SM* 2017 SC 235 at [43]-[44]).

[50] The court prefers the submissions on behalf of the Commissioner about the proper legal approach to a finding of contempt for three main reasons.

[51] First, *Murray* makes it clear that it is sufficient for a finding of contempt that a person deliberately did something that in fact breached an order, even if not intended to be contemptuous. The deliberate conduct constitutes the wilful defiance of the court (paragraph [60]). *Murray* is a decision made by a full court of five judges and what is said in it commands considerable respect. The rationale underlying this approach is that orders should be complied with, if not appealed or reduced, even if burdensome, inconvenient and expensive (*Perkier* paragraph [15]). A wider range of conduct than intentionally contemptuous actions or failures is caught, but there is a commensurately wide set of responses available to the court for dealing appropriately with the case. They range from doing nothing in less serious cases (and if necessary making an adverse finding in expenses if the matter turns out to be so trivial or minor that it was not appropriate to refer it to the court), to imprisonment and high level fines in the most serious cases. While the Notice is not a decision of the court, it is still a decision of a Commissioner established under statute, resolving a dispute between a public authority and a person requesting information. It should similarly be complied with timeously. This finding is unlikely to result in opening the floodgates to certifications to the court because, as already observed in paragraph [14] above, powers to certify are to be exercised proportionately, where there is a need for enforcement or to draw the court's attention to a serious matter.

[52] Second, when *Beggs* is read as a whole, it does not depart from the approach in *Murray* to determining whether there has been a contempt. Although there are dicta in

Beggs suggesting there must be conduct displaying an attitude which was intended to be offensive to the dignity or authority of the court, that is “where there is no question of any court order or undertaking” (paragraph [30]). Here there is an unchallenged Notice, which was an order of the Commissioner the Scottish Ministers had to comply with. Applying the final words in paragraph [30] of *Beggs*, a deliberate failure to comply with the Notice by a time limit set in accordance with statutory requirements implies a lack of respect for the Notice, and hence for the authority of the Commissioner. Other passages in *Beggs* recognise that deliberately doing an act which is in fact a breach of an order is wilfully disobeying an order, and may amount to contempt, even if there is no direct intention to disobey the order (paragraphs [33] to [37]). Failure to comply with the Notice is *prima facie* indicative of contempt (paragraph [39]), a finding bolstered by the letters sent on behalf of the Scottish Ministers of 15 and 22 January 2026 annexing decisions about timing of compliance to themselves. This is not a case where it can be said that all reasonable steps were taken to ensure the Notice was complied with (*Beggs*, paragraph [39]), when there was a deliberate choice to spend a significant part of the period for compliance on activities other than physically preparing documents for disclosure (preparing advice on appealing, making submissions to Ministers, taking further advice).

[53] Third, as already mentioned above, FOIA applies in Scotland as well as FOISA, and in that context, it has been made clear that an approach to contempt akin to *Murray* is the appropriate one (*Bence v Cornwall Council and the Information Commissioner* [2025] UKUT 420 (AAC)) (“*Bence*”), paragraph 109-114). As put in *Navigator Equities* at paragraph 82(vii):

“In order to establish contempt, it need not be demonstrated that the contemnor intended to breach an order or undertaking and/or believed that the conduct in question constituted a breach. Rather it must be shown that the contemnor deliberately intended to commit the act or omission in question. Motive is irrelevant”.

Intention to commit contempt is relevant to whether a sanction should be imposed and if so what it should be, not a pre-condition to a finding of contempt. It is appropriate to adopt an approach consistent with that under related provisions of FOIA, rather than depart from it.

The range of powers available to the court to punish contempt

[54] Under section 53(3) FOISA, there are a wide range of potential outcomes of certification of a case under section 53(1). The effect of the word “may” before “deal” in section 53(3) is that, even if a court found failures by a public authority, it could exercise its discretion not to deal with the public authority as if it had committed a contempt of court, and impose no sanction.

[55] If the court decides to impose a sanction, sanctions available include committal to prison for a period of up to 2 years if imposed by the Court of Session, 3 months by the sheriff court, and 60 days in the district court (Contempt of Court Act 1981 section 15(2)). A fine may be imposed, which is unlimited in a superior court such as the Court of Session, and a maximum of £2,500 (level 4 on the standard scale) if imposed in courts below. The Contempt of Court Act 1981 does not otherwise confine the general powers of the Court of Session in relation to the range of remedies. Other types of orders may be available such as orders for specific performance (for example to produce information). A published finding of contempt may of itself be a sanction. In Scotland that might take the effect of an admonishment. Expenses may be awarded, where appropriate on an indemnity or agent-client, client paying basis (*R (JM) v Croydon LBC* [2010] 1 WLR 1658 (“*R (JM)*”) at paragraph 12). Examples of sanctions, in the context of contempt of court related to

information rights under FOIA, are a finding of contempt together with agreed indemnity costs of £35,000 (*Bence*), or a finding of contempt together with a fine.

Factors bearing on disposal

[56] By analogy with decided cases under FOIA, the type of matters which may be relevant to whether to impose a sanction for contempt, and the appropriate level, include later compliance, apology, explanation for the default, a lack of intention to flout the order, the length of time the contempt lasted, the seriousness of the contempt including the number of acts or omissions involved, the resources and support available to the contemnor to assist with avoiding the commission of the contempt, and the extent to which the respondent has taken steps to rectify matters and avoid future repetition (*Bence* paragraphs 126-128). An admission of contempt may reduce the seriousness of the sanction imposed, because it shows awareness of wrongdoing, and may reduce the scope of proceedings in relation to the associated failures (*Bence*, paragraph 5). The seriousness of the effect of the breach of an order, the functions being carried out by a public authority, and the impact of any financial repercussions might in principle be relevant.

Disposal

[57] The court finds that the Scottish Ministers deliberately failed to comply with a step set out in the Notice by the time limit in that Notice. The deliberate nature of the failure is inferred by the court from the decisions of the Scottish Ministers not to commence the detailed physical work redacting documents until after the Christmas break in 2026 (when the Notice had been issued on 1 December 2025), and the terms of the letters sent by the Scottish Ministers on 15 and 22 January 2026. That is sufficient for the Scottish Ministers to

be in contempt of the Commissioner, applying the approach to contempt in *Murray*. The court is satisfied to the standard of proof beyond reasonable doubt that there has been a contempt.

[58] The court also finds that it is appropriate to exercise its powers in relation to contempt of court, in response to these failures by the Scottish Ministers. As put in *Mid Bedfordshire District Council v Brown* [2005] 1 WLR paragraph 26-27, there is a risk that if the court does not exercise its powers, it might be seen as condoning the breach by a public authority of a deadline fixed by the Commissioner exercising statutory functions in compliance with the requirements of FOISA. That would send out the wrong signal to others tempted to do the same, diminish respect for decisions of the Commissioner, undermine the authority of the Commissioner, and subvert the rule of law. The powers in section 53(3) FOISA aim to enable the court to uphold the authority of the Commissioner and make sure decision notices are obeyed.

[59] In deciding how to exercise its powers, the court balances the following factors, which it considers the most significant in the circumstances of this case. On the one hand, there was later compliance by the Scottish Ministers when they disclosed information on 24 February 2026, and an indication in the letters to the Commissioner they intended to comply. A partial explanation has been provided for the default, in that the court accepts there were additional complexities because of the court orders, and a significant amount of documentation beyond what had initially been identified as within scope by the Scottish Ministers. The Commissioner might have given a slightly longer period for compliance in the original Notice, given the effect of the Christmas holidays, having regard to the Investigations Handbook (although that would not have been longer than a 50 day period in total for compliance). The Commissioner could have elected to follow an alternative

enforcement procedure in his Investigations Handbook, in the form of a warning letter, and 10 further days for compliance before instructing proceedings in the Court of Session (Investigations Handbook paragraph 254), although was entitled not to do so. The Commissioner might also have utilised his power under section 44 FOISA to make recommendations as to good practice to address the more general concern expressed in the letter of 16 January 2026 about last-minute communication on cases relating to the Hamilton inquiry, although that would not have solved the problem of non-compliance in this particular case sought to be dealt with by certifying under section 53(1) FOISA. The court has no information before it that Mr Harrop was caused any specific prejudice because of the delay in providing the information.

[60] On the other hand, in terms of the Commissioner's Investigations Handbook, it may be appropriate in some cases to refer non-compliance to the Court of Session straight away (paragraph 254). In the letter of 16 January 2026, the Commissioner had raised particular concerns about the approach of the Scottish Ministers to cases relating to the Hamilton Inquiry. He was entitled to take the view that this was a case that should be referred without following alternative options in the Investigations Handbook, which is internal guidance, not law. In the event, proceedings were not instituted until 2 February 2026, some 2 ½ weeks after the deadline for compliance, during which time the Scottish Ministers had still failed to comply. Eventual compliance was roughly 6 weeks after the limit set in the Notice, a substantial period, and in total amounting to nearly twice the amount of time ordinarily afforded for compliance with a decision notice.

[61] A need to take advice and consider whether to appeal a Notice, even accepting public authorities may be able to rely on different exemptions on review (*Department for the Environment, Food and Rural Affairs v Information Commissioner* [2012] PTSR 1299 at

paragraphs 21 and 29), does not adequately explain the long delays before work on redactions on behalf of the Scottish Ministers physically commenced. It is possible to carry on workstreams in parallel. The Scottish Ministers have significant resources available to them to assist with avoiding being in contempt. There was a deliberate choice to spend much of the compliance period exploring an avenue that was not ultimately pursued. There was a failure by the Scottish Ministers to contact the Commissioner in advance of the deadline, requesting an extension to a particular date before expiry of the time period, although it is accepted by Mr Chalmers that would have been possible. While the Scottish Ministers may not have subjectively intended to flout the Notice, their annexation to themselves in their letters of 15 and 22 January 2026 of the decision about when they would comply with steps required in the Notice, by maintaining they would comply “as soon as possible” and “as soon as practicably possible”, showed a lack of respect for the Commissioner’s role. It was contrary to the statutory scheme. It is all the more reprehensible because the Scottish Ministers have a role in making the law, and must be assumed to understand the importance of the rule of law. Where a date for compliance in a Commissioner’s decision notice has been fixed in accordance with a statutory provision, the Scottish Ministers ought to observe it, unless it has been disapplied by an appeal being brought or an extension agreed.

[62] The Scottish Ministers did not put before the court any particular steps being taken to rectify matters and avoid future repetition. Nor did they tender any apology to the Commissioner before the court, or admit a contempt. In submissions, it appeared to the court that there was little contrition on the part of the Scottish Ministers. The tenor of the affidavit produced and submissions tended more towards indignation that the Commissioner had exercised his statutory powers in respect of the Scottish Ministers – even

though it is the Commissioner's role to promote the observance of FOISA by Scottish public authorities such as the Scottish Ministers, and section 53 FOISA is a legitimate enforcement mechanism for section 49 decision notices. As the Dean of Faculty put it, it is not helpful to pour petrol on flames, rather than oil on troubled waters.

[63] Although the Scottish Ministers requested a further opportunity to make submissions on expenses following the court's decision on the petition, the court finds that is not necessary. The court provided parties an opportunity at the substantive hearing to address it on expenses and cases such as *Bence* and *R (JM)*, in which awards of indemnity expenses were part of the court's response to a finding of contempt. The guidance this decision may provide on section 53 FOISA, mentioned by the Scottish Ministers, is not a factor which would dissuade the court from applying the general rule that expenses should follow success, and that indemnity expenses may be an appropriate response where a contempt is found (as in this case).

Conclusion

[64] Having made inquiry, and as foreshadowed in the summary at paragraph [4] above, the court finds that the conduct of the Scottish Ministers in relation to the Notice was contemptuous of the Commissioner for the purposes of section 53(3) FOISA. The Scottish Ministers may not subjectively have intended to be contemptuous, but they deliberately failed to carry out a step required in a Notice issued by the Commissioner in exercise of statutory powers by the time specified, and sent correspondence which inappropriately annexed to themselves the decision about when compliance would occur. Although the Scottish Ministers have disclosed information since the petition was raised, they failed to do so by a time limit set under reference to a statutory scheme for recovery of information.

[65] Although in the case of *Beggs* the contemnor was required to appear before the court for a formal finding of contempt of court to be made (at paragraph [51]), that is not necessary in this case. No contempt of court has been found. Rather, because of failures and conduct of the Scottish Ministers in relation to the Notice, contempt of the Commissioner has been found, of the nature which persuades the court to invoke powers available to it in relation to contempt of court.

[66] Having balanced all of the considerations relevant to sanction in this case, the court finds the appropriate response to the failures of the Scottish Ministers is admonition, together with an adverse award of expenses on an indemnity basis. The Scottish Ministers are admonished for their failures to comply until 24 February 2026 with the parts of the Notice that required steps to be taken by them by 15 January 2026. Expenses are awarded against the Scottish Ministers on an agent-client, client paying basis.